

CAHYA MAKMUR HOLDINGS (MELAKA) SDN. BHD.

v.

HEAP HUAT RUBBER CO. SDN. BHD. & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU

LC VOHRAH J

[ORIGINATING SUMMONS NO. 24-83 OF 1991]

14 NOVEMBER 1991

LAND LAW: *Caveat - Order extending duration of caveat - Application to set aside order - Whether the plaintiff had a caveatable interest when it assigned its rights - Failure to disclose such arrangement - Effect of - NLC 1965, s. 323*

By a sale and purchase agreement, the 1st defendant agreed to buy a piece of land from the plaintiff.

A lien holder's caveat had been lodged in respect of the land. This caveat had not been removed and the plaintiff lodged a private caveat in respect of the land.

The 1st defendant then applied to the 2nd defendant the Pendaftar Tanah & Galian for the cancellation of the private caveat and the 2nd defendant issued a notice pursuant to s. 326 of the NLC in Form 19C to the plaintiff that he would cancel the caveat upon expiry of one month from the date of the service of the notice upon the plaintiff unless the Court extended it.

The plaintiff successfully applied to extend the duration of the caveat. This was the 1st defendant's application to set aside the private caveat and it was based on 2 grounds.

- (1) that the plaintiff has no caveatable interest because it had assigned all its rights in the land; and
- (2) that the plaintiff obtained the extension order without disclosing the material fact that there had been an assignment of the plaintiff's interest in the land.

Held:

[1] As a result of the execution of the deed of assignment itself, the plaintiff had in law diverted itself of all its rights to the land when it assigned its right and title to Gerimismas Sdn. Bhd. it had no right to claim a caveatable interest in the land and had no *locus standi* to begin to show that there was a triable issue.

[2] The failure by the plaintiff to disclose the existence of the deed of assignment in its *ex-parte* application warrants the setting aside of the order granted as a matter of right.

[D1's application allowed.]

Cases referred to:

Eng Mee Yong v. V. Letchumanan [1979] 2 MLJ 212 (foll)

Ooi Bee Tat Dvpt. Sdn. Bhd. v. Ooi Bee Tat [1985] CLJ (Rep) 615 (foll)

Legislation referred to:

National Land Code 1965, ss. 323, 326

For the plaintiff - A.K. Lee; M/s. Yee Ling & Co.

For the defendant - G.S. Nijar

a**JUDGMENT****LC Vohrah J:**

b I must begin by expressing my reservations about the propriety of these proceedings before me as I am in effect being asked to review the discretion that was exercised by my brother Judge in Melaka in granting an order extending the caveat of the plaintiff upon an application made *ex-parte* before him. I am bound to hear the present application as there is a sealed order of the High Court at Melaka for the present action to be transferred to the High Court at Johor Bahru and the comment I wish to make is that the application for the transfer that was made by solicitors acting on behalf of the first defendant was rather premature for it should more properly have been made only after the learned Judge who granted the extension had heard the application to set aside his order as he was readily available.

c

So much by way of preface.

d The facts of this case are quite straight forward. By a sale and purchase agreement between the plaintiff and first defendant dated 10 December 1988 (see Exh. "ESH - 1," encl. (2)), the first defendant agreed to sell a piece of land registered under Grant 25081, Lot No. 241, Mukim of Pulai, District of Johor Bahru. The purchase price was RM1,600,000 and the plaintiff paid RM80,000 by way of deposit and part payment. The balance of the purchase price was to be settled within 3 years from the date of the agreement and the first defendant was required to obtain the removal of the lienholder's caveat which had been lodged in respect of the land. This caveat has not been removed and the plaintiff on 19 July 1990 lodged a private caveat in respect of the land. The first defendant then applied to the second defendant for the cancellation of the private caveat and the second defendant pursuant to s. 326 of the National Land Code 1965 issued a notice in Form 19C to the plaintiff intimating that he would cancel the caveat upon expiry of one month from the date of the service of the notice upon the plaintiff unless the caveat was extended by the Court. Hence the application for extension at the High Court at Melaka on 17 July 1990.

e

The present application to set aside the private caveat is based essentially on two grounds:

f

- (1) that the plaintiff has no caveatable interest because it has assigned all its rights in the land; and
- (2) that the plaintiff obtained the extension order from the High Court at Melaka without disclosing the material fact that there had been an assignment of the plaintiff's interest in the land.

g

Section 323 of the Code specifies who may enter a private caveat. The essential requirement is that the person who enters a private caveat must claim title to, or a registrable interest in the land or a right to such title or interest. It is clear from the principles enunciated in the case of *Eng Mee Yong v. V. Letchumanan* [1979] 2 MLJ 212, that the onus is upon the caveator who is not the registered owner to show on the affidavit evidence presented, firstly, a triable issue and, secondly, on the balance of convenience it is better to maintain the caveat.

h

The first defendant contends that based on the plaintiff's own document, the deed of assignment (see Exh. "ESH3", encl. (23)) executed by the plaintiff as "the assignor" in favour of Gerimismas Sdn. Bhd. as "the vendor", the plaintiff had no caveatable interest in the land at the time it applied for and obtained the extension of the caveat on 20 September 1991. The deed was executed with the consent of the first defendant on 20 December 1989, well before that date. I shall now refer to the relevant provisions of the deed.

i

Recital 4 reads:

4. The assignor has agreed to assign to the assignee all those the assignor's rights title and interest in the said land and under the principal agreement and the vendor has consented to such assignment.

Clause 1 reads:

In consideration of the sum of RM80,000 now paid by the assignee to the assignor (the receipt whereof the assignor hereby acknowledges) and further in consideration of the assignee permitting the assignor occupation of the said land the assignor hereby assigns to and unto the assignee all those the assignor's rights title and interest in the said land and under the principal agreement to hold the same unto the assignee as if the assignee were a party to the principal agreement in lieu of the assignor.

Clause 4 reads:

The parties hereby declare and acknowledge that as from the date hereof the assignee shall be the lawful and equitable owner of the said land and that the assignor shall have no claim whatsoever thereto or to any part thereof.

The language of the above provisions, in my view, brooks of no ambiguity and leads only to one conclusion, namely that an absolute assignment of all the plaintiff's rights and interests in the land to Gerimismas Sdn. Bhd. was effected by the execution of the deed. The plaintiff, nevertheless, contends that it still has a caveatable interest because of its obligation to protect the rights of the assignee over the land as the assignee's rights were obtained through it. I find this contention difficult to uphold. As a result of the execution of the deed of assignment itself the plaintiff has in law divested itself of all its rights to the land when it assigned its "right title and interest in the said land" on 20 December 1989 to Germismas Sdn. Bhd. The effect is that it cannot anymore, as a matter of logic, have any right to claim a caveatable interest in the land. It therefore has no *locus standi* even to begin to show that there is a triable issue. On this ground alone the order granted by the High Court at Melaka on 21 September 1990 must be set aside.

Now to the second ground. The effect of failure in disclosing a material fact in an *ex-parte* application has been clearly stated by Edgar Joseph Jr J in *Ooi Bee Tat Dvpt. Sdn. Bhd. v. Ooi Bee Tat* [1985] CLJ (Rep) 615 (p. 622):

It is settled law that when a party applies *ex-parte*, full disclosure of all material facts must be made and that the doctrine of *uberrima fides* applies by analogy: per Davies LJ in *Beese & Ors. v. Woodhouse & Ors.* [1970] 1 WLR 586. For this reason, where material facts have been withheld, the *ex-parte* order may be set aside irrespective of the merits: *Castelli v. Cook* [1849] 7 Hare 89 Eng. Rpts. Vol. 68 p. 36 and *Dalglish v. Jarvie* [1850] 2 Mac. & G 231 (Macnaghten & Gordon's Reports Vol. 2). The fact that the party in whose favour the *ex-parte* order was made may think the facts misstated or concealed not material or may have forgotten them affords no excuse: *The King v. The General Commissioners for the Purposes of the Income Tax Act for the District of Kensington* [1917] 1 KB 486. Furthermore, where there has been suppression of facts, the question of balance of convenience does not arise: *MRK . Nayar v. Ponnusamy & Ors.* [1982] 2 MLJ 174.

In my view, the failure by the plaintiff to disclose the existence of the deed of assignment in its *ex-parte* application warrants the setting aside of the order granted by the High Court at Melaka as a matter of right.

In the result, I make an order in terms of prayers 1 and 2 and for the costs of and incidental to the present application to be paid by the plaintiff.

Also found at [1992] 1 CLJ 399